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83-1977

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

TRAVIS MILLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT

JEROME ROTENBERG
221 North LaSalle Street
Chicago, Illinois 60601
(312) 372-6058
Attorney for Petitioner

The Scheffer Press, Inc.—(312) 263-6850

QUESTIONS PRESENTED

1. Were the due process rights of the petitioner violated by permitting him to be tried and convicted on an indictment that failed to charge an offense?

2. Was the province of the jury invaded by allowing correctional officers to give testimony identifying the petitioner based upon their viewing of a videotape?

3. Did the trial judge's consideration of an improper factor, the death of another inmate, in sentencing the petitioner, constitute a violation of the Due Process clause?

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

No.

TRAVIS MILLER,

Petitioner,

vs.

THE PEOPLE OF THE
STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
FOURTH DISTRICT

To the Honorable, The Chief Justice And
Associate Justices Of The Supreme Court Of
The United States:

Petitioner respectfully prays that a Writ of Certiorari issue to review the order of the Appellate Court of Illinois, Fourth District, entered on November 3, 1983, affirming his conviction.

JUDGMENT AND OPINIONS OF THE COURTS BELOW

The judgment of the Circuit Court of the Eleventh Judicial Circuit, Livingston County, Illinois, was entered on February 16, 1983, without opinion and is not reported. The opinion of the Appellate Court of Illinois, Fourth District, affirming the judgment of the Circuit Court was filed on November 3, 1983, and is reported at 119 Ill. App. 3d 21, 456 N.E. 2d 262, 74 Ill. Dec. 760. A copy of this opinion is set forth in the Appendix. A timely petition for rehearing was denied on December 7, 1983, without opinion. The order of the Supreme Court of Illinois denying petitioner's Petition for Leave to Appeal was entered on April 3, 1984, without opinion and is not reported.

JURISDICTION

The order of the Supreme Court of Illinois denying leave to appeal was entered on April 3, 1984, and the jurisdiction of this court is invoked pursuant to Title 28, United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, United States Constitution.

"No person shall be held to answer for a ... otherwise crime, unless on a presentment or indictment of a grand Jury..."

Amendment VI, United States Constitution.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State... and to be informed of the nature and cause of the accusation..."

Amendment XIV, United States Constitution.

"No State shall ... deprive any person of life, liberty, or property, without due process of law..."

STATUTES INVOLVED

Chapter 38, Section 1003-6-4, Illinois Revised Statutes.

"(a) A committed person who...while participating in any disturbance, demonstration or riot, causes, directs or participates in the destruction of any property is guilty of a Class 2 felony."

Chapter 38, Section 1005-5-3.2, Illinois Revised Statutes.

"(b) the following factors may be considered by the court as reasons to impose an extended term sentence under Section 5-8-2 [Chap. 38, §1005-8-2, I.R.S.] upon any offender who was at least 17 years old on the date the crime was committed:

(1) When a defendant is convicted of any felony, after having been previously convicted in Illinois of the same or greater class felony, within 10 years..."

Chapter 38, Section 1005-8-2, Illinois Revised Statutes.

"Extended Term. (a)...

X X X

(4) for a Class 2 felony, a term shall be not less than 7 years and not more than 14 years;"

STATEMENT OF THE CASE

The petitioner, Travis Miller, was charged along with Terry Starks in Indictment No. 82 CF 162, filed on October 6, 1982, in the Circuit Court of the Eleventh Judicial Circuit, Livingston County, Illinois. The one count indictment charged them with having committed the offense of Correctional Code Violation at Pontiac Correctional Center, Pontiac, Illinois, on July 29, 1982, in that "being a person committed to the Department of Corrections, he caused or participated in the destruction of property during a disturbance at the Pontiac Correction Center by knowingly tearing conduit off pipes and damaging other property, of the State of Illinois, Pontiac Correctional Center in violation of Section 1003-6-4(a) of Chapter 38 of the Illinois Revised Statues: (C-5)"[1].

He was found guilty by a jury on January

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1. "C" refers to the Common Law Record filed in the court below.

12, 1983; and he was sentenced to a term of 11 years imprisonment to be served consecutively to the sentence he was already serving.

The evidence showed that a riot and disturbance that took place at the Pontiac, Illinois Correctional Center on July 29, 1982, was recorded on videotape (T.68).

Several correctional officers testified that they were able to identify the petitioner and Starks from their viewing of the videotape as two of the inmates responsible for tearing pipe off the cell block wall during the disturbance (T.134, 147, 161, 169, 182, 190). These correctional officers did not personally observe the riot, and they made their identifications solely from having seen the videotape depicting the riot and disturbance.

Another inmate, Edgar Dunigan, testified that he saw the petitioner tear some pipe off the wall in front of his cell (T.112). Dunigan, who was serving a sentence for theft

and assault at the time of the riot, had previously been in the penitentiary for the same offenses (T.106). He also had an extensive juvenile record (T.107).

When first interviewed in connection with the disturbance, Dunigan did not tell the investigators what he saw (T.117). After he received six months extra time for disciplinary reasons, he wrote the warden in an effort to get his good time back in exchange for the information he knew about the disturbance (T.127).

The petitioner testified in his own defense and denied that he tore any pipe off the wall and that he had participated in the disturbance (T.224).

REASONS FOR GRANTING THE WRIT

I. The Due Process Rights Of The Petitioner Were Violated By Permitting Him To Be Tried And Convicted On An Indictment That Failed To Change An Offense.

The indictment in this cause charged the petitioner with having committed the offense of Correctional Code Violation (C-5). Specifically, the indictment charged that the petitioner "being a person committed to the Department of Corrections, he caused or participated in the destruction of property during a disturbance at the Pontiac Correctional Center by knowingly tearing conduit off pipes and damaging other property, of the State of Illinois, Pontiac Correctional Center, in violation of Section 1003-6-4(a) of Chapter 38 of the Illincis Revised Statues."

The pertinent part of this section states:

> "A committed person...while participating in any disturbance, demonstration or riot, causes, directs or participates in the destruction of any property is guilty of a Class 2 felony." (Emphasis Added)

The essential elements of the offense of which the petitioner was accused and convicted are (1) that he was a committed person, (2) that he was participating in a disturbance, and (3) that he caused or participated in the destruction of property while participating in a disturbance.

Since the instant indictment did not allege that the petitioner was participating in a disturbance when he caused or participated in the destruction of the property in question, it was obviously defective because it did not state an offense. Unfortunately, the public defender representing the petitioner in the trial court failed to make a motion attacking the sufficiency of the indictment.

Notwithstanding the fact that the indictment was not attacked at the trial stage level, under Illinois law a criminal charge which does not state an offense may be attacked at any time. See People v. Abrams, 21 Ill. App. 3d 734, 316 N.E. 2d 5,8, relying on Chapter 38, Section 114-1(b), Illinois Revised Statutes. Since the failure to charge an offense and the obvious harm to the accused resulting therefrom, is the kind of defect involved in due process of law, it cannot be waived and may be brought up for the first time in a reviewing court. See People v. Heard, 47 Ill. 2d 501, 266 N.E. 2d 340, 343.

In ruling that the defect in the indictment in this cause did not require the reversal of the petitioner's conviction, the court below relied on the case of People v. Pujoue, 61 Ill. 2d 335, 339; 335 N.E. 2d 437, 440.

In Pujoue, the Illinois Supreme Court stated that a complaint, attacked for the first

time on appeal, is sufficient if it apprises the accused of the precise offense charged with sufficient specificity to prepare a defense and allow pleading a resulting conviction as a bar to future prosecutions arising out of the same conduct. In Pujoue, the court upheld the sufficiency of the complaint because the record showed that at trial defense counsel treated the complaint as charging a violation of Chapter 38, Section 24-1(a)(10), Illinois Revised Statutes; and, therefore, the failure to allege that the gun was loaded did not prejudice the preparation of the defendant's defense.

However, that factor is not present in the case at bar. In a colloquy with the court immediately prior to the start of the trial, defense counsel stated the defendants were charged simply with the destruction of prison property (T.18). The prosecutor remarked that the State need only prove (1) that the defen-

ant was committed to the Department of Corrections, (2) that he participated in the destruction of property, and (3) that it occurred during a disturbance or riot at the penitentiary (T.18).

Since neither the prosecutor or defense counsel mentioned the fact that it must also be proved that the defendants were also participating in a disturbance or riot at the time of the destruction of the property, it is obvious that they were unaware of this essential element since the indictment failed to allege it. Therefore, it is obvious that the wording of the indictment in this cause was insufficient to apprise the petitioner of the offense charged with the required specificity so as to enable him to properly prepare a defense.

It should also be borne in mind that the prosecution in Pujoue was commenced with a criminal complaint whereas it was commenced with an indictment in this cause. A criminal

complaint can be amended at anytime to conform to the proof; however an indictment may be amended only by the actions of the grand jury.

The ruling of the Illinois court is in conflict with prior decisions of the federal courts. In Russell v. United States, 369 U.S. 749, 82 S. Ct. 1038 (1962), this court stated:

> "In a number of cases the Court has emphasized two of the protections which an indictment is intended to guarantee, reflected by two of the criteria by which the sufficiency of an indictment is to be measured. These criteria are, first, whether the indictment contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet,' and, secondly, 'in case any other proceedings are taken against him for a similar offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.'" 82 Sup. Ct. at page 1047.

Although the second of these criteria was sufficiently met by the indictment in this case, the first criteria was not met inasmuch as the indictment in this case did not contain all of the elements of the offense intended to be charged.

In United States v. Edrington, (5th Cir. 1984) 726 F.2d 1029, 1032, the defendant's conviction for a violation of 18 U.S.C. §751(a) was vacated because the indictment to which he pled guilty did not contain all of the elements of the charged offense. The conviction was vacated notwithstanding the fact that the defendant raised the issue of the defective indictment for the first time on appeal.

See also United States v. Meacham, (5th Cir. 1980) 626 F.2d 503.

Therefore, the petitioner's conviction should be vacated because the words of the indictment did not "fully, directly, and expressly, without any uncertainty or ambiguity,

set forth all the elements necessary to constitute the offense intended to be punished." United States v. Russell, 82 Sup. Ct. at 1047-1048.

II. The Province Of The Jury Was Invaded By Allowing Correction Officers To Give Testimony Identifying The Petitioner Based Upon Their Viewing Of A Videotape.

Prior to the start of the trial the defense moved that the State not be permitted to call prison personnel to testify as to the identification of persons on the videotape (T.34). These witnesses did not actually see the events portrayed on the videotape. This motion was also renewed during the course of the trial without success (T.134,150).

In his written motion for a new trial, the petitioner alleged that this procedure was a denial of due process as guaranteed by the United States Constitution (C.33).

During argument on the petitioner's motion

for a new trial, the trial judge recognized the fact that there was a problem in the procedure of permitting the correctional officer witnesses to view the videotape (T.344). However, in sustaining his actions in allowing the correctional officers to testify, the trial judge placed them in the category of expert witnesses.

The procedure utilized by the trial judge in permitting the correctional officer witnesses to testify as to their opinions of the identity of the persons on the videotape was an invasion of the province of the jury and was violative of petitioner's due process rights. The law is well settled in Illinois that where the matter to be determined is one upon which the fact finder, in this case the jury, is competent to make a decision, such testimony is unnecessary and inadmissible. See People v. Sanchez, 11 Ill. App. 3d 1079, 297 N.E. 2d 230, 233; People v. Moretti, 6 Ill. 2d 494, 129 N.E.

2d 709, 728, People v. Dixon, 87 Ill. App. 3d 814, 410 N.E. 2d 252, 43 Ill. Dec. 252, 256.

In its decision the court below characterized the testimony of the guards as being lay testimony of persons familiar with the defendants rather than expert testimony. The Illinois Appellate Court based its decisions on Rule 701 of the Federal Rules of Evidence as well as several federal cases and cases from other jurisdictions. No Illinois cases directly in point have been found. However, the cases relied upon by the Illinois Appellate Court are distinguishable from the circumstances present in the case at bar.

In the case of United States v. Butcher, (9th Cir. 1977), 557 F.2d 666, 670, the court stated that there was ample evidence in the record to support the defendant's conviction, aside from the testimony of the police officers; and, therefore, even if the admission of their testimony was in error, it was not

prejudicial. However, in the case at bar, there was not "ample evidence in the record to support the defendant's conviction," aside from the testimony of the correctional officers. The only witness other than the correctional officers who identified the petitioner was fellow inmate Dunigan. However, his testimony was greatly suspect because of his prior convictions (T.106-107), the fact that he did not reveal what he saw when initially interviewed by the investigative agents (T.117) and the fact that he received a reduced sentence in exchange for information he knew (T.127).

In United States v. Barrett, (9th Cir. 1983) 703 F.2d 1076, 1082, 1086, the court held that the improper admission of the government photographic expert's testimony was harmless in view of the other overwhelming evidence of the identification of the defendant. The court also upheld the identification testimony of the defendant's girl friend under Rule 701 because the defendant's appearance had been changed from the date of the

offense to the trial date. In the case at bar there was not "other overwhelming evidence of the identification of the defendant" and there was no evidence presented to the effect that the petitioner's appearance at trial was any different from that at the time of the offense.

Also in the case of United States v. Borrelli, (10th Cir. 1980), 621 F.2d 1092, 1095, the court upheld the lay opinion testimony of the defendant's stepfather on the grounds that in the seven months between the crime and trial, the defendant had significantly altered his appearance, thereby making it difficult for the jury to compare his appearance in court with the appearance of the man in the bank surveillance photograph. The special factual circumstances present in the Borrelli case are not present in the case at bar.

In United States v. Calhoun, (6th Cir. 1976) 544 F.2d 291, 295, the appearance of the defendant had also changed between the time of

the offense and trial.

The Court below, in its opinion, also stated that "the tape was such that the persons stated to be defendants were somewhat in the background of the picture, making it more difficult for jurors to make identification." However, both Rosetti and Knoblauch, who identified the petitioner, stated that they were able to identify Miller "when he came close to the camera" (T.150) and "when he came toward the camera" (T.162). Therefore, the identification of the petitioner was made as the result of his being close to the camera and not in the background. Since he was close to the camera, the jury, especially in view of the fact that his appearance had not been altered, could have been able to make the identification without any assistance.

The lower court also stated that since the scene was a moving one, a person familiar with the defendants' mannerisms and body movements would be better able to determine

whether a defendant was shown in the videotape than would a juror. However, the record in this case is silent as to whether any of the correctional officers identified the petitioner based upon his peculiar mannerisms or body movements.

The cases of People vs. Mixon (1982), 129 Cal. App. 3d 118, 180 Cal. Rptr. 772 and People v. Perry (1976), 60 Cal. App. 3d 608, 131 Cal. Rptr. 629, also relied upon by the lower court, are distinguishable from the factual situation present in the case at bar.

In Mixon, the court stated:

> "In the present case, the surveillance photograph was not a clear depiction of the subject, and appellant had changed his appearance before trial. The officers then could offer aid to the jury as to the identity of the second robber." 180 Cal. Rptr. at page 779. (Emphasis Added).

No showing was made that any such circumstances were present in the case at bar so as

to necessitate aid by the jury in determining whether the petitioner was depicted in the videotape.

Likewise in the Perry case, the California stated:

> "Evidence was introduced that defendant, prior to trial, altered his appearance, by shaving his mustache. The witnesses were able to apply their knowledge of his prior appearance to the subject in the film. Such perception and knowledge was not available directly to the jury." 131 Cal. Rptr. at page 632. (Emphasis Added).

However, the case of State v. Jamison, 1980) 93 Wash. 2d 794, 613 P.2d 776, is analogous to the case at bar and is in conflict with the lower court's opinion. The Jamison court, in ruling that the opinion testimony was inadmissible, stated:

> "Although the surveillance photographs were properly admitted, the defendant himself was in the jury's presence. Thus, the jury was able to compare his appearance with the photographs and decide whether the robber pictured therein was the defendant. The counselors' knowledge of defendant's appearance placed them in

no better position to make that critical determination. Accordingly, the counselors' opinion testimony was an impermissible invasion of the jury's province." 613 P.2d at page 779. (Emphasis Added).

In the case at bar no showing was made in the trial court that the correctional officers were in a better position than the jury to make the "critical determination" as to whether the petitioner was in the videotape. The petitioner was in the jury's presence during the trial, and there was no showing that his appearance had been altered. Therefore, the trial court erred in allowing the opinion testimony of the correctional officer witnesses. This error is apparent regardless of whether their testimony is characterized as expert testimony, as stated by the trial judge, or as lay testimony of persons familiar with the defendants, as stated by the appellate court. This error denied the petitioner his right under the Fourteenth Amendment to the United

States Constitution to have his guilt or innocence determined by a jury.

III. The Trial Judge's Consideration Of An Improper Factor, The Death Of An Another Inmate, In Sentencing The Petitioner, Constituted A Violation Of The Due Process Clause.

The offense of which the petitioner was convicted is classified in Illinois as a Class 2 felony and carries a sentencing range of three to seven years. However, since the petitioner had previously been convicted of the crime of attempt to commit armed robbery, he was eligible for an extended term of not less than 7 years and not more than 14 years. Chapter 38, Section 1005-8-2(b)(4), Illinois Revised Statutes.

In sentencing the petitioner to a term of 11 years to be served consecutively to the sentence he was already serving, the trial court improperly concluded that the petitioner's conduct caused the death of another inmate, Orlando Lopez, and also caused injuries to

other inmates (T.361-362). However, there was no evidence at the sentencing hearing or trial to show that the petitioner's actions were in fact responsible for the death of Lopez or the injuries to other inmates.

The appellate court agreed that the trial court record did not "support the trial court's finding that the defendant's conduct caused serious physical harm to the inmate who was killed in that the evidence did not show a connection between the portion of the conduit torn by Miller and passed by Starks and the wounds suffered by the inmate." Notwithstanding this conclusion the court below improperly held that no reversible error occurred.

Consideration of this factor by the trial court in imposing sentence upon the petitioner was highly prejudicial and constituted a clear abuse of the trial judge's discretion which

effectively denied the petitioner his rights under the Due Process clause of the Fourteenth Amendment to the United States Constitution.

Illinois courts have uniformly held that a new sentencing hearing is warranted when a trial judge considers improper factors in sentencing an individual. See People v. Vaughn, 56 Ill. App. 3d 700, 371 N.E. 2d 1248; People v. Hammock, 68 Ill. App. 3d 34, 385 N.E. 2d 796; People v. Gant, 18 Ill. App. 3d 61, 309 N.E. 2d 265; People v. Allen, 97 Ill. App. 3d 38, 422 N.E. 2d 254.

Since it is obvious that the trial judge improperly considered the serious factor of a fellow inmate's death in sentencing the petitioner, this cause should be remanded to the trial court for a new sentencing hearing untainted by the consideration of the death of Lopez.

CONCLUSION

Wherefore, for the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Appellate Court of Illinois, Fourth District, should be granted.

Respectfully submitted,

JEROME ROTENBERG
Attorney for Petitioner

FILED
11/3/83

Nos. 4-83-0144, 4-83-0145 Cons.

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appellee,	)	Appeal from
(4-83-0144) v.	)	Circuit Court
	)	County of
TERRY STARKS,	)	Livingston
	)	No. 82 CF 162
Defendant-Appellant.	)	
	)	
THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Honorable
	)	William T. Caisley
Plaintiff-Appellee,	)	Judge Presiding
(4-83-0145) v.	)	
	)	
TRAVIS MILLER,	)	
	)	
Defendant-Appellant.	)	

JUSTICE GREEN delivered the opinion of the court:

After a trial by jury in the Circuit Court of Livingston County, defendants, Terry Starks and Travis Miller, were convicted on January 12, 1983, of a violation of section 3-6-4(a) of the Unified

Code of Corrections (Ill. Rev. Stat. 1981, ch. 38, par. 1003-6-4(a)). On February 16, 1983, the court sentenced them to terms of 12 and 11 years' imprisonment, respectively. Each sentence was ordered to be consecutive to sentences each defendant was then serving. Separate notices of appeal were filed but the cases have been consolidated in this court.

Defendant Miller maintains that the indictment was defective. They both contend that: (1) The trial court erred in allowing correctional officers to give testimony identifying defendants as persons the officers had seen on a videotape taken during the occurrence giving rise to the charges; (2) the prosecutor's closing argument was prejudicially improper; and (3) the court erred in sentencing.

The indictment returned on October 6, 1982, charged of each defendant that on July 29, 1982:

> "being a person committed to the Department of Corrections, he caused or participated in the destruction of property during a disturbance at the Pontiac Correctional Center by knowingly tearing conduit off pipes and damaging other property, of the State of Illinois, Pontiac Correctional Center,"

In violation of section 3-6-4(a) of the Unified Code of Corrections. Relevant portions of that section state:

> "A committed person *** while participating in any disturbance, demonstration or riot, causes, directs or participates in the destruction of any property is guilty of a Class 2 felony." (Emphasis added.) (Ill. Rev. Stat. 1981, ch. 38, par. 1003-6-4(a).)

Thus, the charges did not state in the language of the statute that the defendants were "participating in [a] disturbance" while they participated in destruction of the property. Defendants maintain that, accordingly, the indictment was fatally defective.

Defendants' contentions concerning the sufficiency of the indictment are viewed in the posture of the failure of the defense to raise the issue in the trial court. When attack is made upon a charge at this time, the charge "is sufficient if it apprised the accused of the precise offense charged with sufficient specificity to prepare his defense and allow pleading a resulting conviction as a bar to future prosecution arising from the same conduct." (People v. Pujoue (1975), 61 Ill. 2d 335, 229, 335 N.E. 2d 437, 440.) In Pujoue, a complaint purporting to charge unlawful use of weapons (Ill. Rev. Stat. 1973, ch. 38, pars. 24-1(a)(4), 24-1(a)(10)) failed to make the required allegation that the weapon involved was either concealed or loaded. The supreme court, nevertheless, deemed the charge sufficient to enable preparation of a defense and to protect the defendant from double jeopardy.

We need not decide whether any defect in

the charges here would constitute error, if timely raised, because any claimed defect was no more prejudicial to defendants here than was the defect in Pujoue which failed to apprise the defendant that the State claimed his weapon was concealed or loaded. Here, as in Pujoue, a resulting conviction could be pleaded in bar of subsequent prosecution. The defect in the charge did not require reversal.

The evidence undisputedly showed that on July 29, 1982, defendants were inmates at the Pontiac Correctional Center and that a riot occurred at that institution on that date apparently arising from a dispute between rival gangs. An inmate was killed during the course of the riot. The evidence was also undisputed that a telephone communication conduit was torn from a wall during the episode. One inmate testified that he saw defendant Miller tear portions of the conduit off of a wall and pass it to another inmate. The witness was im-

peached by evidence that he had previously told an investigator that he knew nothing of the incident and then told of seeing Miller's conduct only after receiving favorable treatment from the administrative officer of the center. All of the rest of the testimony tying either defendant to the offenses charged came from the testimony of correction officers who had viewed a videotape of the occurrence made by cameras which had been trained on the area where the riot occurred. This testimony identified Miller as a person shown in the tapes to be tearing a portion of a conduit from a wall and Starks as a person shown there to have passed the torn conduit to other inmates.

Defendants argue that the testimony of the guards was expert testimony by persons not experts and on a subject upon which the jury was fully capable of making its own determination by viewing the tapes after they were admitted into evidence. (People v. Dixon

(1980), 87 Ill. App. 3d 814, 410 N.E. 2d 252.) However, we do not deem the testimony to have been expert testimony but rather lay testimony of persons familiar with the defendants, identifying persons shown on tapes as defendants. Although the witnesses did not all know the names of the defendants, all testified to having seen the defendants they identified on numerous occasions prior to the event. Some of them had to look at mug shots containing the defendants names in order to learn the names of the defendants.

The United States Circuit Courts of Appeal have considered the problems of the introduction of testimony of lay witnesses identifying the accused as being a person depicted in pictures. At issue has been the application of Rule 701 of the Federal Rules of Evidence which states:

> "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those

> opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." (28 U.S.C.A., Rule 701.)

In United States v. Calhoun (6th Cir. 1976), 544 F.2d 291, the court stated that testimony of a defendant's parole officer that the defendant was a person shown in a picture taken at the time of the offense would have been helpful because the appearance of the defendant had changed between the time of the offense and trial. The court stated that the evidence "teases the outer limits" of Federal Rule 701. Nevertheless, the court awarded a new trial because of the prejudicial effect of showing that the defendant was subject to parole.

In United States v. Butcher (9th Cir. 1977), 557 F.2d 666, testimony similar to that given to Calhoun was given by the defendant's probation officer and two law enforcement officers. The court held that the trial court did

not abuse its discretion in considering the probative value of the evidence to outweigh the prejudice arising from the inference that defendant had committed other crimes. The court was concerned with whether the testimony invaded the province of the jury because, unlike in Calhoun, the appearance of the defendant at trial was more similar to that at the time of the crime than that when the witnesses last saw the defendant before the crime. The court concluded that the admission of the evidence was not error of constitutional dimensions. See also, United States v. Barrett (9th Cir. 1983), 703 F.2d 1076; United States v. Borrelli (10th Cir. 1980), 621 F.2d 1092.

In People v. Mixon (1982), 129 Cal. App. 3d 118, 180 Cal. Rptr. 772, California law, as first established in People v. Perry (1976), 60 Cal. App. 3d 608, 131 Cal. Rptr. 629, was described as requiring:

> "two predicates for the admissibility of lay opinion testimony as to the identity of persons depicted in surveillance photographs: (1) that the witness testify from personal knowledge of the defendant's appearance at or before the time the photo was taken; and (2) that the testimony aid the trier of fact in determining the crucial identity issue." (129 Cal. App. 3d 118, 128, 180 Cal. Rptr. 772, 777; see also State v. Jamison (1980), 93 Wash. 2d 794, 800, 613 P.2d 776, 779.)

Mixon and Jamison both indicate that the second predicate can be satisfied whenever the surveillance photograph is not a clear depiction of the subject or the defendant's appearance at the time of trial is different from his appearance at the time of the crime.

Here, there was no prejudice from having correctional officers testify because the jury would otherwise have been fully aware that the defendants were convicted criminals. The officers were familiar generally with the defendants' appearances at the time of the occur-

rance but there was no indication that their appearances had changed by time of trial. The indications of the Butcher opinion was that the court there would have upheld the admission of the evidence under these circumstances. However, in United States v. Jackson (7th Cir. 1982), 688 F.2d 1121, 1125, the court implied that testimony of the nature here should be excluded when not necessary because the accused's appearance had changed between time of the offense and time of trial.

In this case there is an additional element referred to in Mixon but not involved in the Federal cases. The tape was such that the persons stated to be defendants were somewhat in the background of the picture, making it more difficult for jurors to make identification. This case is also different than those cases in which still pictures were used. Here the scene shown was a moving one. One familiar with the defendants' mannerisms and body move-

ments would be better able to determine whether either defendant was shown in the videotape than would a juror who had only seen defendants in the court room.

We conclude that the testimony here was rationally based upon the witnesses' personal knowledge of the defendants before the occurrence and their perception of what they saw in the videotapes. It was an aid to the jury in resolving the issue of identification and did not invade the province of the jury. We hold the evidence to be admissible. We caution, however, that admission of such testimony would permit similar testimony on behalf of defendants. (See, Jackson, Shador, J., dissenting.) Trial judges should limit the amount of such cumulative evidence.

Objection was made that the procedure in which the witnesses viewed mug shots was unduly suggestive because of some evidence that the officers talked among themselves while viewing

those pictures. However, the procedure was only for the purpose of obtaining the name of the persons the officers had in mind and not for the purpose of determining whether the persons the officers had in mind were the persons shown on the videotape. The procedure was not erroneous.

We need not comment on defendants' claims of error in the prosecutor's closing argument. Clearly, none of the argument amounted to plain error. If any lesser error occurred it was waived by the failure of defendants to raise the issue in the trial court. People v. Pickett (1974), 54 Ill. 2d 280, 296 N.E. 2d 856.

The offense of which the defendants were convicted was a Class 2 felony, punishable by a term of from 2 to 7 years' imprisonment. (Ill. Rev. Stat. 1981, ch 38, par. 1003-6-4(a).) The trial court found each of them to be subject to extended terms of imprisonment (Ill. Rev. Stat.

1981, ch. 38, par. 1005-5-3.2(b)(1)) of 12 years for Starks and 10 years for Miller. In making a comprehensive explanation of the sentence imposed, the trial court mentioned that it found the conduct of defendants to have caused serious harm to the convict who was killed. Defendant Miller maintains that imposition of an extended term was error. Both contend that the finding that the defendants' conduct had caused harm to the convict who was killed was not supported by the evidence and was prejudicial error.

The consecutive sentences were imposed because each defendant had, within the past 10 years, been convicted in this state of a greater class felony upon charges separately brought and tried and arising out of different acts. (Ill. Rev. Stat. 1981, ch. 38, par. 1005-5-3-2(b)(1).) Miller's prior conviction was for armed robbery and that of Starks was for murder. Defendant Miller maintains that

the enhancement was improper because the reason they were incarcerated was because of those offenses and thus those offenses should be considered as an element of the offense of which their convictions are on appeal. He seeks to draw analogy to the decisions in People v. Haron (1981), 85 Ill. 2d 261, 422 N.E. 2d 627, and People v. Gresham (1982), 104 Ill. App. 3d 81, 432 N.E. 2d 654. In Haron, the court held that the possession of a weapon by the accused cannot both raise what would otherwise be a misdemeanor to a felony and also serve as the basis for convicting the defendant of armed violence. Similarly, in Gresham the court held that the same prior conviction may not enhance what would otherwise be a misdemeanor charge to a felony and also serve as the basis of imposing an extended term sentence for that felony. Miller also stresses that in People v. Allen (1981), 97 Ill. App. 3d 38, 422 N.E.2d 254, we held that in sentencing the trial court erred

in considering, as an aggravating factor (Ill. Rev. Stat. 1979, ch. 38, par. 1005-5-3-2(a)), that the defendant's conduct caused or threatened serious harm. We concluded there that the harm threatened was no greater than that inherently threatened in any burglary and that the legislature did not intend to enhance sentences for conduct inherent in the principal offense.

The foregoing cases are not analogous to the instant case. In Haron, the very same conduct was used to raise the offense for which the defendant was convicted from a misdemeanor to a felony and then to armed violence. In Gresham, the offense was raised to a felony and then enhanced merely because of the same conviction. Here, the defendants had to have been committed to the Department of Corrections to have been guilty of the offense charge and would not have been committed but for the offenses used to enhance. However, here, there

is no predicate offense which rose from a lessor offense merely because defendants had committed the prior offenses used to enhance. Miller contends that either the offenses of criminal damage to property (Ill. Rev. Stat. 1981, ch. 38, par. 21-1(a)) or criminal damage to state supported property (Ill. Rev. Stat. 1981, ch. 38, par. 21-4(a)) could constitute that predicate offense. But the offense charged here requires not only that the defendants be committed to the Department but that their conduct occur during a disturbance, an element which was not part of the offenses used to enhance.

The case also differs from Allen. Even if being committed to the Department be deemed the same as the commission of an offense that is an element of the crime, the commission of a crime severe enough to be used to enhance the sentence is not required in order for a person to be committed. That could result from a misde-

meanor or a lesser felony. Thus, the conduct forming the basis for the enhancement was not inherent in the offense for which the defendants had been convicted as was the case in Allen.

The record does not support the trial court's finding that the defendants' conduct caused serious physical harm to the inmate who was killed in that the evidence did not show a connection between the portion of the conduit torn by Miller and passed by Starks and the wounds suffered by the inmate. However, the court's finding that the defendants intended that the torn material be used as a weapon could have properly been inferred from the evidence. The complained-of finding was but one of many aggravating factors considered. No contention was made at sentencing that the court was considering improper aggravating factors. No reversible error occurred.

For the reasons stated, we affirm the

convictions and the sentences.

Affirmed.

TRAPP and MILLER, JJ., concur.

59580

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62706
(217) 782-2035

April 3, 1984

Mr. Jerome Rotenberg
Attorney at Law
221 N. LaSalle Street
Suite 1763
Chicago, Illinois 60601

No. 59580 - People State of Illinois vs. Terry Starks (People State of Illinois, respondent, vs. Travis Miller, petitioner). Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 25, 1984.